SUPREME COURT, U. S.

MAY 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1709

JOHN R. HENRY, JR.,
Respondent,

v.

AMALIE SNEIDERS, and AMALIE SNEIDERS
as personal representative of the Estate of
MAKSIS SNEIDERS, deceased,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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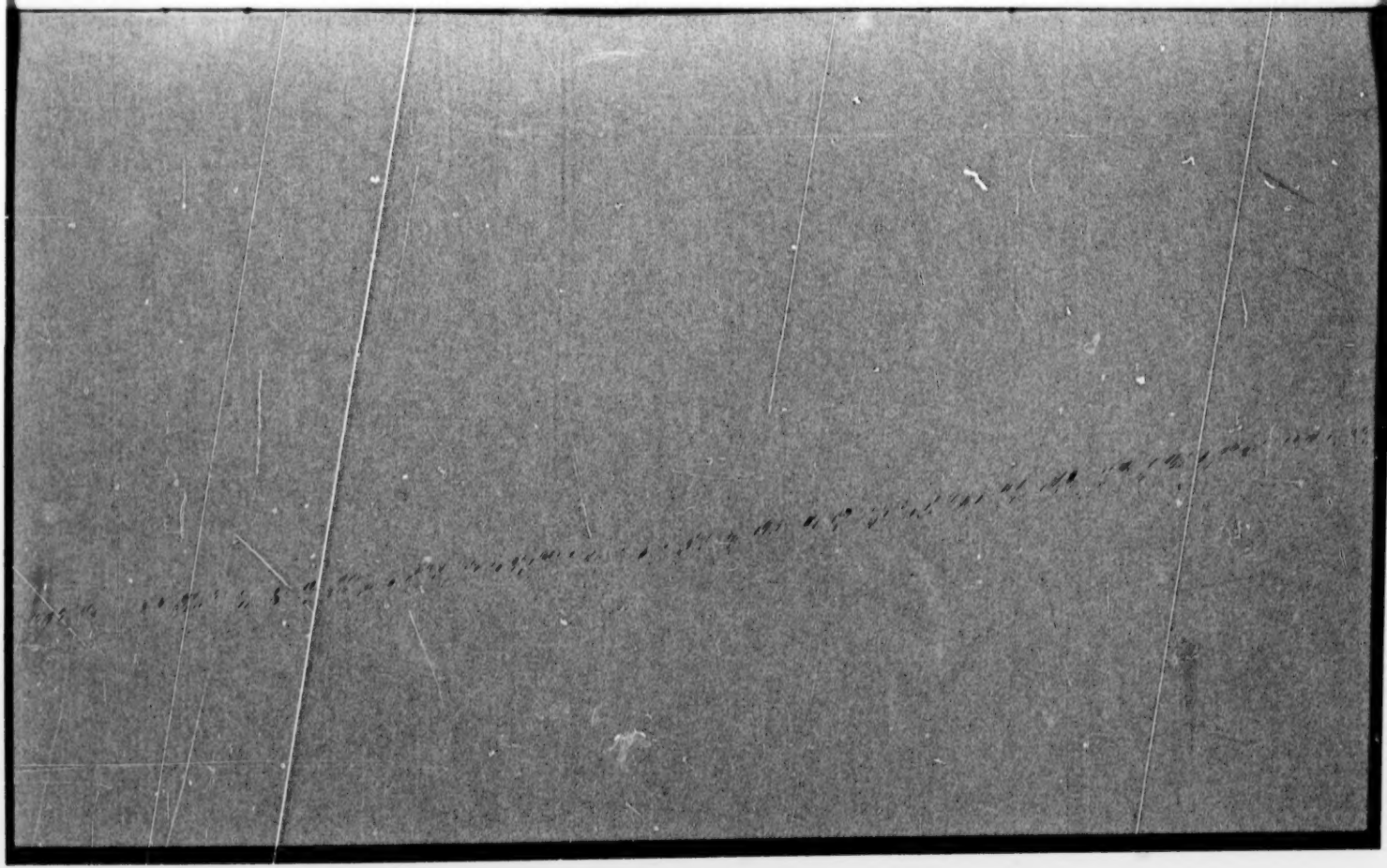

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JOHN R. HENRY, JR.,

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AMALIE SNEIDERS, and AMALIE SNEIDERS as personal representative of the Estate of MAKSIS SNEIDERS, deceased,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Amalie Sneiders, in both her individual and representive capacities, respectfully prays that a Writ of Certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit rendered on the 11th day of January, 1974, sustaining a judgment entered in the United States District Court for the Western District of Washington upon an order of default entered as punishment for petitioner's good faith assertion of her Fifth Amendment right to refuse to produce potentially incriminating private, personal records for inspection.

OPINION BELOW

The opinion of the Court of Appeals is reported at 490 F.2d 315, and reproduced as Appendix A hereto. The per-

tinent portion of that opinion, which petitioner asks this court to review, is contained in the following three sentences disposing of petitioner's right to assert her Fifth Amendment privilege:

> "Under an agreement between the prosecutor and appellant's husband, the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not tend to incriminate the defendant. Any incriminating information was already in the hands of the prosecuting authorities."[1]

JURISDICTION

(i) The date of the Court of Appeals decision was January 11, 1974.

(ii) A petition for rehearing was duly served and filed on January 24, 1974. The petition for rehearing was denied on February 19, 1974. Copy of said order denying petition for rehearing is set forth as Appendix B hereto. May 20, 1974 is the 90th day following February 19, 1974.

(iii) The statutory provisions relied upon to confer jurisdiction on this court are as follows:

The initial action commenced in the United States District Court was based upon diversity of citizenship pursuant to 28 USCA 1332. The appeal to the Court of Appeals was made pursuant to 28 USCA 1294. The jurisdiction of this court is invoked pursuant to 28 USCA 1254.

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1. The characterization of the status of the records as being "in the hands of the prosecuting authorities", is an inaccurate statement, not supported by the record or argument, either oral or written. The records were and still are in petitioner's possession. Unfortuately, the head note editor for West Publishing Company states in the syllabus that the records were in the "possession" of the prosecuting authorities, which is not a fact.

QUESTIONS PRESENTED

1. Whether petitioner, as defendant in a civil case, who in good faith invoked her Fifth Amendment privilege against self-incrimination by refusing to produce her potentially incriminating personal private records for inspection upon request pursuant to Fed. R. Civ. P. No. 34 and who is thereafter adjudged in contempt for such refusal and as punishment therefor her pleadings stricken and an order of default against her, is thereby deprived of the rights guaranteed by the Fifth Amendment.

2. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a request to produce for inspection potentially incriminating personal private records that have been previously displayed to prosecuting authorities in plea bargaining negotiations in a parallel criminal action under an agreement that (1) such disclosure be without prejudice to petitioner later claiming her Constitutional rights, and (2) the prosecuting authorities would not disclose the contents of the records to the plaintiff.

3. Does the striking of petitioner's pleadings and the entry of a default as punishment for contempt for refusing to produce her potentially incriminating, private, personal records, under a good faith claim of constitutional privilege, render the assertion of the Fifth Amendment privilege "costly" in violation of the decisions of this court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself,* nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Federal Rule of Civil Procedure No. 26, Subsection (b)(1):

"(b) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

"(1) IN GENERAL. Parties may obtain discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the parties seeking discovery or to the claim or defense of any other party, including the existance, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (Emphasis supplied)

3. Federal Rule of Civil Procedure No. 34 is set out in full as Appendix C.

4. Federal Rule of Civil Procedure No. 37 is set out in full as Appendix D.

STATEMENT OF THE CASE

John R. Henry Jr., hereafter referred to as Henry, instituted an action on April 28, 1970, in the United States

District Court for the Western District of Washington as Cause No. 8913 against petitioner, Amalie Sneiders, hereinafter referred to as Sneiders, and her now deceased husband, Maksis Sneiders.

The complaint alleged that Sneiders had obtained the sum of $71,242.68 from Henry by fraud, in that Henry had purchased rare stamps from Sneiders for that amount upon the representation by Sneiders that such stamps were genuine, when in fact the stamps were worthless forgeries. Henry also alleged that the stamps would have been worth three times the price he paid had they been as represented, and prayed for the loss of his bargain.

At the same time, Henry obtained a Writ of Attachment upon posting a bond in the amount of $75,000.00 and filing an affidavit, which stated in part:

> "The damages for which the action is brought are for injury arising from the commission of a felony."

A few months later, Sneiders discovered Henry had been instrumental in prevailing upon the United States Attorney to consider presenting an indictment to the Grand Jury charging them with several felony counts for mail fraud under 18 USCA 1341 and 1342 based on some of the same allegations as in the Henry civil action. Sneiders personally, and through their attorney, entered into plea-bargaining negotiations with the United States Attorney in an effort to convince him that he could not possibly obtain a conviction. By that time, Sneiders had determined through discovery proceedings that Henry had no record or knowledge of what he had ordered from Sneiders and was therefore incapable of testifying that the stamps he received were not in fact stamps he ordered, it being con-

ceded that Henry had ordered many forgeries and facsimilies as well as genuine stamps. To make these plea-bargaining negotiations meaningful, it was necessary for Sneiders to allow the United States Attorney to inspect the orders actually submitted by Henry to Sneiders. Before that inspection took place, an agreement was entered into between the United States Attorney and Sneiders to the effect that such inspection was without prejudice to Sneiders' right to claim their constitutional privileges. The United States Attorney also agreed that he would not reveal the contents of the Sneiders' private records to Henry. See Appendix E, affidavit of Amalie Sneiders dated September 15, 1971, which is the only evidence ever presented to the United States District Court relating to the agreement. No contradicting evidence of any kind was ever presented, or suggested.

The plea-bargaining negotiations failed and the petitioner and her husband were indicted. Thereafter, a request was made by Henry in the civil action pursuant to Federal Rule of Civil Procedure No. 34 for production of the Sneiders' personal private records showing the orders received and the merchandise furnished in response thereto. Sneiders refused to produce such personal private records claiming privilege against self-incrimination pursuant to the Fifth Amendment. Maksis Sneiders died on May 24, 1971, while this matter was pending. The United States Attorney dismissed the indictment against petitioner, on June 16, 1971. However, said dismissal was without prejudice and the statute of limitations for the charges in the indictment has not yet expired. Since the United States Attorney had sufficient evidence to obtain an indictment against petitioner in the first instance it is reasonable to

assume she could be reindicted any day the Grand Jury happens to be in session. All the factors upon which the United States Attorney decided to dismiss the indictment are not known, but it is reasonably probable that he lost confidence in his ability to obtain a conviction because of the contents of petitioner's records indicating Henry's claim was without merit as well as the inability of Henry to testify that he did not receive what he actually ordered. It is reasonably probable that the postal inspectors hoped to cure Henry's lack of testimonial knowledge of the identity of the stamps he ordered by obtaining his orders for his inspection in the civil case, before the criminal case was presented to the grand jury. The alleged fraud was discovered and the postal inspectors began their investigation in May of 1969. The civil case was instituted in April, 1970. The indictment was not presented until December, 1970. If the petitioner's records could be obtained at any time before the statute of limitations expires, the deficiency in the government's evidence will be corrected and it is reasonably probable the petitioner may be reindicted.

In a discovery deposition, Henry testified that he was complying with requests of the postal inspectors in the managment of his civil case, which was in fact a concession that his discovery proceedings were designed to obtain evidence for use in the parallel criminal case.

The District Court recognized that the threat of petitioner being re-indicted inhibited proceeding with discovery in the civil case when he stated on July 9, 1971, in open court:

> "THE COURT: Well, I would like to get the United States Attorney to let us know one way or the other,

because it's kind of becoming a comedy of errors and the discovery is impeded because of her potential criminal liability, if any, and at least, she can say there is a problem and until it is resolved, then it does inhibit the taking of her deposition and so forth."

A few minutes thereafter, the trial judge directed that petitioner submit her private records to Henry for inspection, and when the matter of petitioner's Fifth Amendment privilege was raised, the trial judge stated he would commit petitioner's attorney to jail if petitioner did not produce the records for inspection in the following language:

"THE COURT: Well, I want these documents in Mr. Heckendorn's [counsel for Henry] hands prior to that date, [Aug. 9, 1971] or on that date, he can take a default, and you will have your record and put it in any kind of shape you want it. I will have the court reporter here, and you can make a record.

"MR. EVANS: This is not the way the rules provide this should be done. Now the rules are binding on me—

"THE COURT: You can put that in the record, your objection to the rules. You have been told three or four times to exhibit those orders to the plaintiff. Now he is not going to ask for it again, and I am not going to ask for it again. So you can make your record any way you want to.

"THE CLERK: What time will that be scheduled for August 9, which is a Monday?

"THE COURT: We'll make it 10:00 o'clock.

"THE CLERK: Ten a.m., Monday, August 9.

"THE COURT: Well, arrange for Mr.—

"MR. EVANS: May I have a copy of this immediately? Because I don't know what I am going to do, but I have to do something.

"THE COURT: Well, you be ready to give those papers to Mr. Heckendorn, or you will be in jail, that's

what's going to happen. You will be in contempt of court. So he can also proceed with his default.

"MR. EVANS: Would you care to fix my bond now, Your Honor?

"THE COURT: No. I will fix the bond at the time on August 9 at 10:00 o'clock."

Before August 9, 1971, petitioner made application to the Court of Appeals for the Ninth Circuit for an Extraordinary Writ to stay the trial judge's hand. On August 9, 1971, that matter was still pending in the Court of Appeals for the Ninth Circuit. At the hearing on August 9, 1971, the trial judge stated in part:

"THE COURT: Well, I have not imputed, and don't intend to impute any bad faith in Mr. Evans. I think that when I lost my temper the other day and told him he had to turn those papers over to you, because it had been several months since he had been instructed to do that, I said if he did not turn them over, I would have the Marshall take charge of him, but I didn't mean to impute bad faith, or any intentional misstatement. • • •"

The trial judge further stated:

"THE COURT: Well, I will tell you, I will take one bit of advice from your lawyer. Mrs. Krug made a point, which I think is valid, and that is that your contumacious behavior is based upon a good faith opinion that your client needs the protection of the Fifth Amendment at all costs in this case.

• • •

"You have to resist turning these papers over, in good faith. I am willing to accept your good faith, and I'm not going to put you in jail. I think your courage is commendable. • • •"

It should be noted that Henry had never moved for an order pursuant to rule 37 requiring petitioner to produce

the records for inspection. Henry had been content to simply make the request and petitioner timely responded pursuant to rule 34, claiming Constitutional privilege. However, in the absence of any motion, as contemplated by the rules, for an order to compel production there was no proper forum in which to debate the issue. As a result there never was any hearing or ruling dealing with the assertion of privilege. The trial judge simply ordered production of the documents, *sua sponte*, and ignored all protestations of the assertion of the Fifth Amendment privilege. When it became apparent that the trial judge intended to enter an order of default, without ever affording petitioner a hearing as contemplated by rule 37, petitioner filed her affidavit, personally claiming her Fifth Amendment privilege. See Appendix E attached hereto.

Thereafter, the Court of Appeals for the Ninth Circuit declined to grant an extraordinary writ. On October 19, 1971, the trial judge entered an order finding petitioner and her counsel had willfully obstructed justice and were in contempt of court for having refused to produce petitioner's potentially incriminating private personal records. As punishment for these acts the trial judge struck petitioner's pleadings and entered an order of default. See Appendix F hereto. A hearing on the issue of damages was held but petitioner was not allowed to testify for the reason she had asserted her Fifth Amendment privilege. A judgment of $235,338,89 was entered against petitioner.

The decision on the appeal to the Court of Appeals is set forth in Appendix A and the order denying petition for rehearing as Appendix B.

REASONS FOR GRANTING WRIT OF CERTIORARI

(a) Issue Is Not An Isolated Case But a Wide Spread Misconception of Fifth Amendment Privilege

This court has heretofore granted certiorari in Cause No. 73-689, *Michael Anthony Maness*, Petitioner, *v. The Honorable James R. Meyers*, Respondent. The issues of law in this case are on all fours with the issues in that case. A decision in one disposes of the other. It is therefore respectfully requested that consideration be given to consolidating the cases.

In *Maness*, the Fifth Amendment privilege against being compelled to testify against one's self was denied because the documents the petitioner was required to produce in a civil action for an injunction had been displayed to the public on a newsstand. Here the right to claim the Fifth Amendment privilege against testifying against one's self is denied by the Court of Appeals for the reason:

> "Any incriminating information was already in the hands of prosecuting authorities."

Both in this case and in the *Maness* case, the lower courts misconstrued the thrust of the Fifth Amendment's prohibition against being a witness against one's self, erroneously believing that the privilege was wholly dependant upon secrecy.

It is obvious that these lower courts (and probably many others) conceived the novel theory that once the privileged evidence had been disclosed to anyone, the privilege was lost. The undersigned cannot improve upon the example set out in the petition in *Maness*:

> "To cite only one obvious example: The Fifth Amendment would have protected Jack Ruby against being

> subpoenaed to testify before a Dallas County grand jury that he shot Lee Harvey Oswald, despite the fact that millions of television viewers saw him do it."

Although the trial judge in the case at hand made no explanation why he disregarded petitioner's Fifth Amendment privilege, it is obvious that he, as well as the Court of Appeals, proceeded upon the false dual premise that the Fifth Amendment privilege protects only "private" (in the sense of "confidential") communications and that an individual who permits another to inspect private records thereby loses the protection afforded by the Fifth Amendment.

The common judicial reference to the Fifth Amendment privilege being a prohibition against "self-incrimination" has caused many courts to lose sight of the fact that the actual words of the Fifth Amendment prohibit a person from being "• • • a witness against himself, • • •". Unless this court promptly corrects this increasingly common erroneous view, the Fifth Amendment privilege will be eroded away. This court should point out it does not prohibit a prosecuting authority from producing incriminating evidence from sources other than the person charged, but it does prohibit any court from compelling such person to produce that evidence himself. The refusal of the petitioner to produce her potentially incriminating private records was an assertion of her right to refuse to be a "• • • witness against herself • • •" but that right was denied because of the misconception that prior disclosure destroys the privilege. Unless this bogus theory is quickly dispelled every witness or person accused will be faced with the impossible burden of proving the evidence demanded has never been disclosed to anyone else, which would in effect destroy the Fifth Amendment privilege.

(b) Conflict With Decisions of Other Circuits

FIRST CIRCUIT: *Ottomano v. United States,* 468 F.2d 269 (1st Cir. 1972) at page 273:

> "The great weight of authority is to the effect that waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding."

SECOND CIRCUIT: *United States v. Miranti,* 253 F.2d 135 (2d Cir. 1958) at page 139:

> "The government does not contend that the statements previously made by Bando to the FBI constitute a waiver of the privilege against self-incrimination to deprive him of the right to invoke the privilege in this grand jury hearing. Such contention would be frivolous because it is well established that a waiver of the privilege in one proceeding does not affect the rights of a witness or the accused in another independent proceeding."

THIRD CIRCUIT: *In re Neff,* 206 F.2d 149, 36 ALR2d 1389 (3rd Cir. 1953) at page 152:

> "It necessarily follows that a witness, such as the defendant here, who testified to a matter before the grand jury did not thereby waive her right to claim her constitutional privilege against self-incrimination as to the same subject matter when called as a witness in the subsequent trial of a person indicted by the grand jury. It has been so held by every appellate court before which the question has come."

FOURTH CIRCUIT: *United States v. Goodman,* 289 F.2d 256 (4th Cir. 1961) at page 259:

> "A waiver of the privilege must occur in the same proceeding in which it is sought to be invoked."

FIFTH CIRCUIT: *Poretto v. United States,* 196 F.2d 392 (5th Cir. 1952) at page 394:

> "The Constitutional privilege attaches to the witness in each particular case in which he is called upon to testify, without reference to his declarations at some other time or place or in some other proceeding."

(c) The Circuit Court Has Decided An Important Question of Federal Law, Which Has Not Been, But Should Be, Settled By This Court

This court has never specifically passed upon this issue, which is of great importance to the preservation of one of the most fundamental Constitutional privileges. Plea-bargaining is an established way of life, created out of economic necessity in criminal practice. To be meaningful, plea-bargaining frequently, if not always, involves disclosure of potentially incriminating evidence, even if it only furnishes a link in a chain of circumstances necessary to convict. If the decision of the Court of Appeals in this case, or the decision of the District Court in the *Maness* case, is allowed to stand, a legal precedent will be established. Thereafter no accused will dare enter into plea-bargaining negotiations lest the privilege against self-incrimination be lost. The Court of Appeals opinion in this case creates a new theory, contrary to what had heretofore been believed to be the settled law. See 58 Am. Jur. *Witnesses*, §99, at page 82:

> "A person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it *as to the same matter* in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined *without reference to what he said when testifying as a witness on some other trial, or on former trial of the same case, and without reference to his declarations at some other time or place.*" (Emphasis supplied.)

In addition to the decisions of the Courts of Appeal heretofore cited, other courts have considered the law settled as contrary to the decision below. A few such decisions are: *United States v. Malone,* 111 F. Supp. 37 (N.D. Calif. S.D. 1953); *United States v. Steffen,* 103 F. Supp. 415 (N.D. Calif. S.D. 1951); *Apodaca v. Viramontes,* 212 P.2d 425, 53 N.M. 414, 13 ALR2d 1427 (N. Mex. 1949); and the Court of Appeals for the Ninth Circuit itself in *United States v. Cohen,* 388 F.2d 464 (9th Cir. 1967).

(d) The Decision of the Court of Appeals Has So Far Departed From the Admonitions of This Court That the Assertion of the Fifth Amendment Privilege Shall Not Be "Costly", As to Call for An Exercise of This Court's Power of Supervision

As pointed out in Appendix F, the trial court entered the default as punishment for petitioner's assertion of her Fifth Amendment right against self-incrimination. That order together with the judgment in the amount of $235,338.89 (as contrasted to the prayer for $71,242.68) is a "costly" penalty to pay for the assertion of a Constitutional privilege, and is contrary to the decisions of this court, including but not limited to *Griffin v. State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106; *Malloy v. Hogan,* 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653; *Garrity v. State of New Jersey,* 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562; *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574.

CONCLUSION

For the foregoing reasons petitioner respectfully prays that her petition for certiorari be granted.

Respectfully submitted,

VAUGHN E. EVANS
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR.,
Plaintiff-Appellee,
v.
AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased,
Defendant-Appellant.

No. 72-2096

[January 11 ,1974]

Appeal from the United States District Court for the Western District of Washington

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Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.*

PER CURIAM:

This is an action for fraud and breach of contract arising from the sale of rare stamps through the mail. The plaintiff alleged that the defendants, Amalie Sneiders and Maksis Sneiders, who is now deceased, sold counterfeit stamps, misrepresented by them to be genuine, to the plaintiff. Proceeding under Fed. R. Civ. P. 34, plaintiff sought discovery of certain records concerning the disputed transactions. Following defendant's repeated refusal to produce these records, the district court entered default judgment in favor of the plaintiff pursuant to Fed. R. Civ. P. 37(b)(2).[1] Defendant appeals, and we affirm.

*Of the District of Oregon.

1. If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .
"(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

We consider appellant's six assignments of error separately.

1. *Were the defendant's records protected by the privilege against self-incrimination?* After the commencement of this civil action, the appellant and her husband were indicted for mail fraud, the indictment being based in part on the sale of stamps to the plaintiff. The indictment against the defendant was dismissed following the death of her husband, but the dismissal was without prejudice. Since the defendant was subject to criminal prosecution for the transaction at issue in the instant civil case, she claims that records concerning that transaction are protected by the Fifth Amendment privilege against self-incrimination.

The claim is without merit. Under an agreement between the prosecutor and appellant's husband, the records were handed to the postal authorities in connection with the criminal proceedings. Therefore, even if the records were incriminating, their disclosure in the civil case would not have tended to incriminate the defendant. Any incriminating information was already in the hands of the prosecuting authorities.

2. *Was the default judgment greater in amount or different in kind than that prayed for in the complaint?* Fed. R. Civ. P. 54(c) provides that a

> judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

The appellant argues that the judgment was different in kind from that prayed for in that it ran against her personally rather than as a member of the marital community. The plaintiff, however, prayed "for judgment against the defendants *and each of them, and* the marital community composed of them." (Emphasis added.) Therefore, the personal default judgment conformed to the pleadings.

The appellant also argues that the default judgment for $235,338.89 exceeded the $71,243.68 prayed for in the complaint. That part of the prayer, however, was for the amount that the plaintiff had paid to the defendants. In addition, plaintiff prayed for additional damages for breach

of contract, the amount of which was to be proved at trial.[2] The prayer was not limited to $71,243.68, and the default judgment did not exceed the amount prayed for.

3. *Should the district court have granted summary judgment in favor of defendant?* Appellant argues that plaintiff lacked sufficient evidence with which to prove his case and that summary judgment against him should have been awarded. Any insufficiency of the plaintiff's evidence was a direct result of appellant's refusal to comply with a legitimate request for discovery. The assignment of error is, therefore, entirely without merit.

4. *Should the trial judge have been disqualified for prejudice?* Appellant draws our attention to a number of dialogues between the trial judge and appellant's counsel in an effort to show prejudice on the part of the trial judge. The trial judge understandably expressed dissatisfaction and frustration over appellant's repeated refusals to produce the records. But our review of the record reveals that, notwithstanding this understandable frustration, the trial judge was extremely fair to the appellant and her claim of privilege. She was given repeated opportunities to produce the documents and avoid a default judgment, but she continued to refuse.

There is no evidence whatsoever of prejudice or improper conduct on the part of the trial judge.

5. *Was appellant entitled to a jury trial on the issue of damages?* After entering default judgment on the issue of liability, the district court held a hearing to determine the amount of damages. Although appellant had asked for a

2. Plaintiff prayed as follows:

"By reason of breach of the contract, misrepresentation, and fraud of the Defendants, Plaintiff has suffered a direct loss of the purchase price in the amount of $71,243.68, *together with additional amounts* not yet fully determined for appraisal examination costs, *loss of the value of the stamps as represented*, legal expenses and attorneys' fees, embarrassment, anxiety, and loss of health, the full amounts of which Plaintiff will prove at the time of trial. . . .

"WHEREFORE, Plaintiff prays for judgment against the Defendants *and each of them*, and the marital community composed of them, in the sum of $71,243.68 damages for funds fraudulently procured, *and for Plaintiff's other damages as are proved at the time of trial, together with interest and costs.*" (Emphasis added.)

jury on that issue, the court denied the request and proceeded without a jury.

Fed. R. Civ. P. 55(b)(2) authorizes a district court to hold an evidentiary hearing following a default judgment to determine damages.[3] The Rule preserves the right of trial by jury "when and as required by any statute of the United States." Appellant cites no "statute of the United States" requiring a jury trial under these circumstances. Nor is this court aware of any such statute. Therefore, the Rule does not itself require a jury trial on the issue of damages.

Nor does the appellant have a constitutional right to a jury trial under these circumstances, since the Seventh Amendment right to trial by jury does not survive a default judgment. *Brown v. Van Braam*, 3 U.S. 344 (1797); *Midland Contracting Co. v. Toledo Foundry and Machine Co.*, 154 F. 797 (7th Cir. 1907); *Johnson v. Bridgeport Deoxidized Bronze and Metal Co.*, 125 F. 631 (C.C.D. Conn. 1903); *Raymond v. Danbury & N.R. Co.*, 20 F. Cas. 332 (No. 11,593) (C.C.D. Conn. 1877); *Gill v. Stolow*, 18 F.R.D. 508 (S.D.N.Y. 1955), *rev'd on other grounds*, 240 F.2d 699 (2d Cir. 1957); 6 *Moore's Federal Practice* ¶55.07.

6. *Was the appellant denied a fair opportunity to offer evidence on the issue of damages?* Appellant argues that she was precluded from offering evidence at the hearing to determine damages. Although some evidence was excluded, it would have been relevant only as to liability and, since liability was not then an issue, the evidence was properly excluded as irrelevant. Appellant draws our attention to no excluded evidence which was relevant to the issue of damages.

Although she does not explicitly assign it as error, the appellant also argues that the district court made no formal

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3. "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or *to determine the amount of damages* or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and *shall accord a right of trial by jury to the parties when and as required by any statute of the United States.*" Fed R. Civ. P. 55(b)(2). (Emphasis added.)

order for discovery. Since default under Fed. R. Civ. P. 37(b)(2) is permitted only for refusal to comply with a *court order* for discovery, appellant argues that default was improper. It is true that the district court did not issue a written order directing the appellant to produce the records. It is clear from an examination of the oral proceedings, however, that the district court had orally ordered appellant to produce the records. Where oral proceedings unequivocally give a litigant notice that certain documents are to be produced, the absence of a written order does not preclude the entry of a default judgment for failure to comply. *See Jones v. Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967); *Moore's Federal Practice*, ¶37.03.

Each of appellant's assignments of error is without merit. The judgment of the district court is affirmed.

The mandate will issue at once.

APPENDIX B

FILED
Feb. 19, 1974
U.S. Court of Appeals
DOCKETED
[Superimposed by Rubber Stamp]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN R. HENRY, JR., *Plaintiff-Appellee,* v. AMALIE SNEIDERS, and AMALIE SNEIDERS, as Personal Representative of the Estate of Maksis Sneiders, Deceased, *Defendant-Appellant.*	No. 72-2096 ORDER DC 9813 ATG

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Duniway and Wright voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

APPENDIX C

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may

move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

APPENDIX D

Rule 37. Failure to Make Discovery: Sanctions

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) APPROPRIATE COURT. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) MOTION. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) EVASIVE OR INCOMPLETE ANSWER. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) AWARD OF EXPENSES OF MOTION. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving

party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER

(1) SANCTIONS BY COURT IN DISTRICT WHERE DEPOSITION IS TAKEN. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or

defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of the subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director,

or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) SUBPOENA OF PERSON IN FOREIGN COUNTRY. A subpoena may be issued as provided in Title 28 USC § 1783, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOHN R. HENRY, JR., *Plaintiff,* v. MAKSIS SNEIDERS, *et ux.*, *Defendants.*	No. 8913 AFFIDAVIT OF AMALIE SNEIDERS CLAIMING CONSTITUTIONAL RIGHTS AND PRIVILEGES

STATE OF WASHINGTON }
COUNTY OF KING } ss.

AMALIE SNEIDERS, being first duly sworn upon oath, deposes and says that she is one of the defendants named in the above-entitled cause and is the surviving spouse of MAKSIS SNEIDERS, deceased, named as co-defendant in said cause:

That she does now personally claim her Constitutional rights and privileges, including but not limited to those guaranteed under the Fourth, Fifth, Sixth and Seventh Amendments, as they apply to the production of her books and records for inspection by plaintiff and his counsel, and ratifies all claims of privileges heretofore made by her attorney of record.

That she has good cause to believe, and does believe that if she were compelled to allow plaintiff and his counsel to inspect her books and records, that it would tend to incriminate her, and otherwise deprive her of her Constitutional rights and privileges; that she was indicted by a grand jury as a co-defendant in Criminal Cause No. 52129 in the United States District Court for the Western District of Washington, on charges arising out of the same allegation set forth in the plaintiff's complaint herein; that she has seen a copy of portions of the Postal Inspector's Report to the United States Attorney furnished as a basis for the decision to prosecute and the presentation of an indictment

to the grand jury; that said report states in the first paragraph:

> "The basis of the investigation was receipt of a complaint from an individual who purchased stamps in excess of $70,000.00 and later learned that the bulk of the stamps were forgeries.";

that the report later identifies the unnamed individual referred to in said quotation as the plaintiff in this civil suit.

That the affidavit of plaintiff's counsel filed herein on April 29, 1970, as a basis for the issuance of a writ of attachment states on page 2, lines 15 and 16: "The damages for which the action is brought are for injury arising from the commission of a felony."; that said claim was made to comply with the ninth ground for the issuance of a writ of attachment as set out in RCW 7.12.020

> "That the damages for which the action is brought are for injuries arising from the commission of some felony * * *";

that, if the allegations of plaintiff's complaint were true, the crime alleged could be prosecuted under the laws of the State of Washington as well as under the laws of the Federal Government.

That at the time co-defendant Maksis Sneiders consented to allow the United States Attorney to inspect our books and records, he was assured that by so doing he was not waiving any of his Constitutional rights and privileges and that the United States Attorney had agreed that by allowing such inspection neither Maksis Sneiders nor I would be in any way prejudiced in claiming our Constitutional rights and privileges; that neither Maksis Sneiders nor I would have allowed the inspection of the books and records without such assurances and agreement.

That at the time Maksis Sneiders agreed to allow the United States Attorney to inspect our books and records, he was assured that there was an agreement by the United States Attorney that none of the information contained in our books and records would be disclosed to the plaintiff, so that the plaintiff would not have any advance knowl-

edge of the information in our books and records either at the time he testified in the criminal case, or at the time he testified in the civil case; that Maksis Sneiders and myself were advised and believed that said agreement was a part of an agreement between our counsel and the United States Attorney that he would not disclose to us any information he obtained from the plaintiff herein, so that neither party to this civil suit would gain or lose any advantages by negotiating with the U.S. Attorney; that neither your affiant nor Maksis Sneiders would have consented to the inspection of our books and records by the United States Attorney, if it had not been for the assurance that the United States Attorney would not reveal any information gained from our books and records to the plaintiff so that the cross-examination of the plaintiff would not be prejudiced or rendered ineffective by advance knowledge of the information contained in our books and records.

That although the indictment in Criminal Cause No. 52129 has been dismissed, said dismissal is without prejudice and no guarantee of immunity has been tendered or offered to your affiant; that the statute of limitations on the crimes claimed by plaintiff to have been committed by your affiant will not expire for several years; that since the dismissal of the indictment in Criminal Cause No. 52129, your affiant has learned that the postal inspectors are still investigating your affiant, and the United States Attorney's Office is still interested in your affiant; that although your affiant does not know the full scope of the further investigation and study by the postal inspectors and the United States Attorney's Office, your affiant concludes, and therefore states as a fact, that there is a genuine threat that she may be prosecuted for some crime arising out of the claim of the plaintiff and that the information contained in her books and records would tend to incriminate her; that regardless of the action of the Federal Government your affiant could be charged in the State court on the allegations of the complaint.

That this affidavit is made for the purpose of complying with all requirements that the affiant personally claim her Constitutional rights and privileges; that in the event there

be some technical defect in the manner in which this assertion is made, your affiant respectfully requests that she be given the opportunity to cure such technical defect by further affidavit.

s/ AMALIE SNEIDERS

Amalie Sneiders

Subscribed and sworn to before me this 15th day of September, 1971.

s/ VAUGHN E. EVANS

Vaughn E. Evans

NOTARY PUBLIC in and for the State of Washington, residing at Seattle

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOHN R. HENRY, JR., *Plaintiff,* v. MAKSIS SNEIDERS and AMALIE SNEIDERS, *Defendants.*	No. 8913 ORDER OF DEFAULT

THIS MATTER came on regularly before the undersigned Judge sitting in the above entitled Court on August 9, 1971, pursuant to Order for Delivery of Documents or, alternatively, for a Default Judgment in accordance with Order entered July 9, 1971. The Plaintiff was represented by his attorneys, Heckendorn & Judd, C. Henry Heckendorn of counsel, and the Defendant, Amalie Sneiders, personally and as Personal Representative for Maksis Sneiders, deceased, was represented by her attorney, Vaughn E. Evans. The Court inquired whether or not the Defendant, Amalie Sneiders, or her attorney, Vaughn E. Evans, had complied with the foregoing Order of Court dated July 9, 1971, directing them to deliver at once to Plaintiff's attorneys for examination and for copying the originals of all orders for stamps delivered by the Defendants to the Plaintiff and the Court was advised that such orders had not been delivered. The Court thereupon directed the Defendant, Amalie Sneiders, personally and as Personal Representative of the Estate of Maksis Sneiders, deceased, through her attorney, Vaughn E. Evans and also ordered her attorney, Vaughn E. Evans, to deliver copies of all such orders to Plaintiff's counsel at this time. Counsel for Defendants refused and failed to comply with the above Order to Produce orders and with the previous Pre-Trial Orders herein, and gave no justifiable reason for not doing so. The Court finds that acts by the Defendants and their counsel constitute willful obstruction of justice and contempt of Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the pleadings herein of Maksis Sneiders and Amalie Sneiders, his wife, and Amalie Sneiders, individually and as Personal Representative of the Estate of Maksis Sneiders, deceased, be and they are hereby stricken, and said Defendants and each of them be and they are hereby found and declared to be in default and Plaintiff is authorized to present evidence in support of his Complaint herein.

DATED this 19th day of October, 1971.

s/ ALFRED T. GOODWIN
Alfred T. Goodwin
Judge

Presented by:
s/ C. HENRY HECKENDORN
C. Henry Heckendorn
Of counsel for Plaintiff